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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 752

EDWARD J. GILL, FRANK C. MENKING, JAMES A. HILL, WILLIAM BRITTON, DONALD E. WILSON, GEORGE P. ELY, ALBERT A. PEARCHER, JOSEPH C. HOENETCK, JOHN J. SCHUBERT, WILBERT T. MAYER, HERMAN C. CARLSON, CLINTON O'SHELL, SR., WALTER F. WEIR and JOHN P. DAUGHERTY,

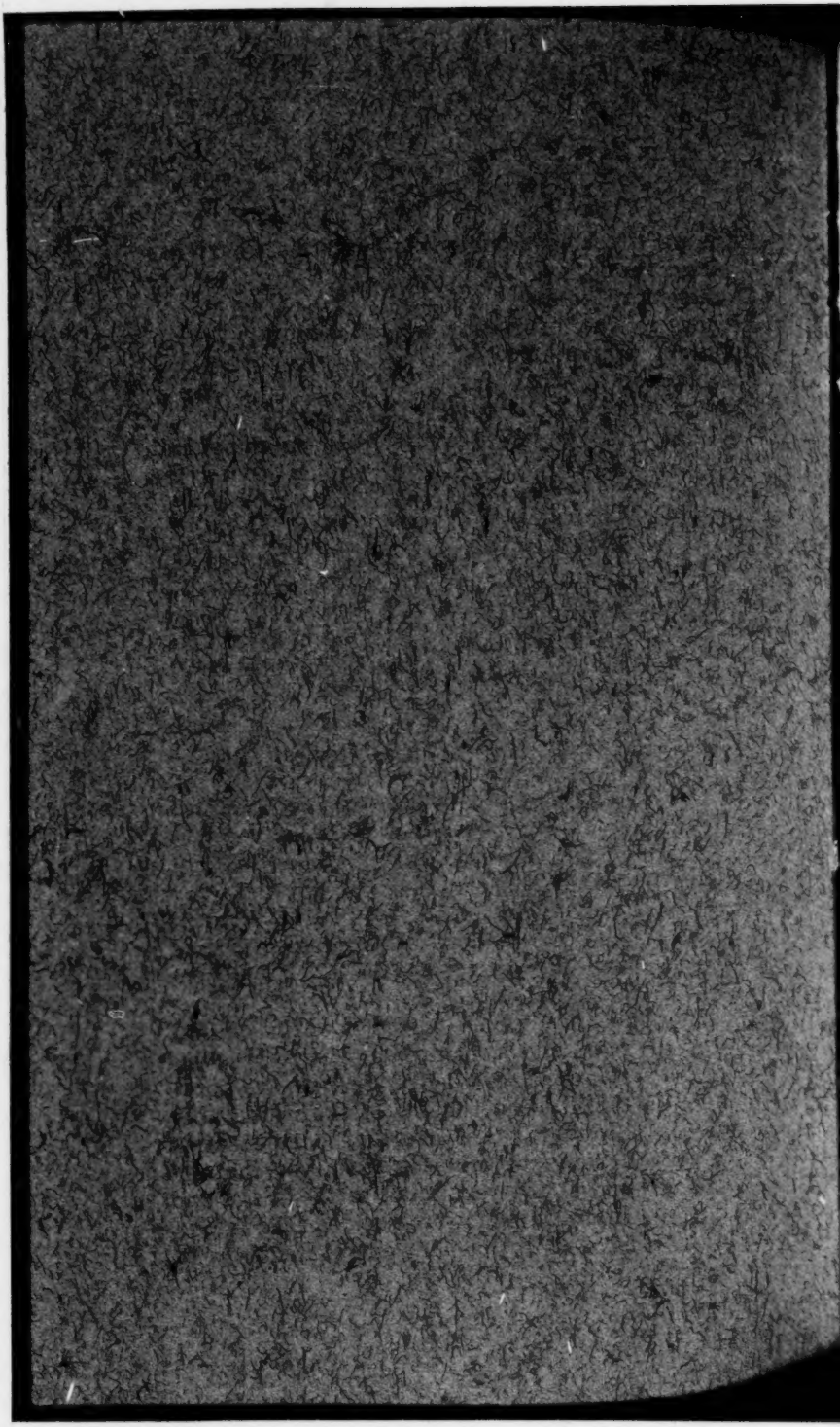
Petitioners,

vs.

MESTA MACHINE COMPANY, *Corporation.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Edward J. Gill, et al.,
Pro Se.



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SUPREME COURT OF THE UNITED STATES

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No. 752

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Petitioners,

vs.

MESTA MACHINE COMPANY, A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Basis on Which It Is Contended That This Honorable Court Has Jurisdiction

Jurisdiction of this Honorable Court exists by virtue of the Act of Congress of June 25, 1938, c. 676; 52 Stat. 1060; 29 U. S. C. A. pars. 201-219, as amended, and section 240 as amended, Judicial Code, 28 U. S. C. A. 347.

Date of Circuit Court's Judgment and Opinion

The Circuit Court rendered its judgment and opinion on January 21, 1948.

Statement of Case

All plaintiffs are employed in the machine shop of defendant corporation. During the period covered by the claim, all were engaged in activities admittedly in interstate commerce. (Admitted in defendant's answer.)

United States District Court jurisdiction of the cause of action and parties thereto was admitted.

Although in the original answer (par. 6th) defendant avers that plaintiffs were paid in full all compensation due them, and that there is no money owing to plaintiffs, by stipulation (Appendix to Appellee's Brief, Vol. I, page 6b) it is admitted that plaintiffs worked overtime and were not compensated therefor. The exact number of overtime hours and amount of compensation has not yet been established.

Defendant set up an affirmative defense to the claim (par. 5th, answer) averring that plaintiffs' work was "of such an executive and administrative character as exempts their employment by the defendant from the scope and effect of the Fair Labor Standards Act of 1938."

Sixty-two witnesses, including the fourteen plaintiffs, testified for plaintiffs, who also called as for cross-examination three of defendant's officers.

Defendant offered no witnesses or defense whatever, apparently relying entirely on the testimony of the witness Berg, who was examined extensively by defense counsel after being cross-examined by counsel for plaintiffs. The record consists of 993 pages; of these Mr. Berg's entire testimony covers 79 pages.

The testimony was only partially printed. The Circuit Court accepted the typewritten transcript of the testimony consisting of about 1000 pages in lieu of printing same.

Reference is therefore made to the said typewritten testimony.

This original transcript will disclose that Mr. Berg admitted the following:

A. The entire machine shop is a single department (Trial transcript 20).

B. There are no subdivisions of the machine shop (Trial transcript 20).

C. The plaintiffs have nothing to do with placing of machines in the shop (Transcript 23).

D. The scheduling of production is done by the superintendent and not by plaintiffs (Trans. 24-25).

E. On each of the three shifts of the twenty-four hour workday a "turn foreman" is in charge of the machine shop (Trans. 24).

F. Labor relations bargaining through union representation was carried on by Mr. Berg himself (Trans. 27).

G. The company never gave any instructions to plaintiffs concerning their duty or authority (Trans. 29-30).

H. The company never gave any instructions to plaintiffs regarding their activities during a labor relations election (Trans. 31).

I. Plaintiffs have nothing to do with hiring employees (Trans. 31).

J. Wage rates and increases are recommended by the superintendent but must be approved by an executive "wage committee" consisting of three officers of the company (Trans. 32).

K. The determination of replacements of machinery is made by top management without reference to plaintiffs (Trans. 34-35).

L. Selection of materials and specifications are determined by an engineering department (Trans. 36-37).

M. No "foremen meetings" were ever held with plaintiffs present (Trans. 38).

N. Policy meetings were held with the "turn foremen" (not plaintiffs) and superintendents (Trans. 38).

O. All plaintiffs had been employed in production work in the machine shop prior to being placed on salary (Trans. 38-39).

P. Defendant's "Exhibit A" indicating apparent subdivisions of the machine shop was only prepared especially for use in the trial and all the coloring and numbering of the facts thus marked were added only for the purpose of the trial (Trans. 64-65-66).

Q. That the plaintiffs' right to recommend dismissal of a helper was no greater than that of an operator or "journeyman" (Trans. 70-71).

R. That plaintiffs put in "thirty to forty hours a month" demonstrating the operation of machines in addition to "taking tools and jigs and other devices and plans and drawings to the machine operator" (Trans. 73).

S. Timing of jobs is done by the time study department and not by plaintiffs (Trans. 76).

T. Plaintiffs received from three to four hours supervision a day from the turn foremen (Trans. 85).

U. The "general foreman" is the foreman or "turn foreman" of the department (Trans. 85).

V. No manual of instructions was ever given to plaintiffs (Trans. 85).

All plaintiffs testified that they were not told that they were even given a job title as foreman when they were taken off their machines.

Statement of Case

It is admitted that for periods varying from two and one-half to five months prior to being placed on salary, plaintiffs performed exactly the same job duties on hourly rate, receiving time-and-one-half for overtime, shift differentials, and group bonuses as compensation. The only difference in status was that plaintiffs were placed on salary. IT IS ADMITTED THAT WHEN THIS CHANGE TOOK PLACE, THAT NO ADDITIONAL AUTHORITY WAS CONFERRED UPON PLAINTIFFS.

All of the plaintiffs testified that they performed work of a similar character to that performed by non-exempt employees ranging from a minimum of two hours per day to as much as eight hours per day. This testimony is corroborated by actual production employees and is NOT DENIED BY DEFENDANT.

Helpers and laborers in the machine shop were supervised by a shift "labor foreman" (Trans. 960-62-24), who was himself an hourly rated employee and therefore, not an executive under the terms of the regulations.

The work of machine operators in conjunction with plaintiffs, had to be approved by hourly rated inspectors.

All plaintiffs testified that they had no authority given them to hire, discharge, discipline, promote or demote or otherwise change the status of any employee; that they had no control over other men who were assigned to their group; that they had no authority or control over the scheduling of production; selection of materials, determination of cost or final approval of the production; that they were never called into any supervisory meetings, were never told anything concerning company policy with regard

to personnel or any other matter, that they were not required to and did not keep any merit ratings for any employees in their groups, that they were not instructed in any labor relations, or on the meaning of the term "grievance" and were not authorized to discuss or settle grievances of employees.

The record discloses that the earnings of hourly rated employees in the machine shop were higher than the earnings of plaintiffs.

After the close of hostilities in World War II, most of the plaintiffs were returned to their original jobs as machinists on the same machines from which they were removed.

In brief, the mechanical skills of all plaintiffs were employed during the war emergency to help expand and sustain production; the only jobs which were assigned to or performed by these plaintiffs were mechanical in nature, coupled with an obligation to help out less skilled men brought into the shop during an emergency. None of the plaintiffs was given authority over the personnel of the shop; they were on hand if needed by new employees, or to help in set-ups of jobs, or for advice on mechanical matters in connection with operation of machines—but for no other duties whatsoever.

The learned trial judge grouped all plaintiffs in joint findings and conclusions.

Although absolutely no evidence exists in the record to establish that 10 of the 14 plaintiffs had at any time actually recommended advancement or promotion of other employees, (see Trial Court's Findings of Fact No. 7); and although each plaintiff positively and affirmatively denied possessing any such authority, the learned trial judge finds that *all* plaintiffs possess this necessary element to

constitute them executives. This finding is affirmed by the Circuit Court.

Similarly, the 9th Finding of Fact by the learned Trial Court is absolutely unsupported as to 10 of the 14 plaintiffs, yet the Court held *all* plaintiffs "customarily and regularly exercised discretionary powers." Of course this element is just as essential as any of the other five characteristics set out in the Administrator's Regulation defining an executive: and despite the absence of proof or evidence of record to support the finding as to 10 plaintiffs, the Circuit Court affirms the District Court's finding.

The plaintiffs contend that the burden on the defendant is to establish the presence of *all* of the six elements as to *each* plaintiff in order to avoid overtime compensation.

Plaintiffs proved their case in the stipulation, *supra,* alone, by the admission that *all* worked overtime without compensation therefor.

Defendant rested its case at the conclusion of plaintiffs' testimony. No proof of the existence of *any* of the six elements referred to, as to *any* of the 14 plaintiffs was therefore established by affirmative proof of any kind by defendant.

Questions Presented

1. Did the Circuit Court correctly interpret the requirements of Sec. 213 (a) of the Wage and Hour Administrator's Regulation, 52 Stat. 1067, 29 U. S. C. A.?

2. Did the Circuit Court correctly find that "there was substantial evidence to support the findings of the learned trial judge" to the effect that all six characteristics of an "executive" were possessed by all fourteen plaintiffs?

3. Where it is stipulated of record that all plaintiffs worked overtime for which they were not compensated; and where no defense is offered affirmatively by defendant, is the Circuit Court correct in sustaining the findings and

conclusions of the District Court which were not supported by any evidence whatever as to some of the six elements characterizing an "executive"?

4. Where the trial judge refused to consider preferred testimony of union experts, to the effect that plaintiffs would not be considered by them as part of management, and absolutely no official of defendant or any expert management witness was offered to support the bare assertion that plaintiffs were properly considered "executives"; and where the refusal to hear the union experts is in conflict with the recommendations of the Administrator—was the Circuit Court correct in affirming the decision of the District Court?

Specifications of Error

The Circuit Court of Appeals erred:

1. In affirming the findings and conclusions of the District Court.

2. In holding that the findings and conclusions of the District Court were supported by substantial evidence of record.

3. In holding that all fourteen plaintiffs were exempt from the benefits of the overtime provisions of the Fair Labor Standards Act of 1938 as "executives".

4. In effectively reducing the burden of proof heretofore required of employers to exempt employees from overtime compensation benefits under the Fair Labor Standards Act of 1938.

5. In effectively voiding the authority of the Wage & Hour Administrator to formulate regulations binding upon trial court which rejected the recommendation of the Administrator to accept into evidence the testimony of qualified union officials as expert witnesses in helping in the determination of the "executive" status of employees.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. *The Circuit Court decided an important question of Federal law involving the construction of the Fair Labor Standards Act of 1938 (52 Stat. 1060); 29 U. S. C. pars. 201-209), which has not been, but should be settled by this Court.*

Although it has been decided by this Honorable Court that employees who are admittedly "foremen" may still not be "executives" so as to exempt them from the overtime benefits of the Fair Labor Standards Act of 1938; *Walling* v. *Sun Publishing Co.*, 140 F. (2d) 445 (affirmed 88 L. Ed. 1564); the question as to what characterizes a "foreman" so as to make him part of executive management has not yet been before this Court.

The plaintiffs in the present case deny that they were ever foremen. They contend they never were more than skilled machinists.

Certainly if the plaintiffs were not even foremen, then they were no part of management, and cannot be properly classified as executives.

In view of the general acceptance of the term "foremen" in the industry, it is submitted that the "turn" foremen were here the only "executives" in the machine shop.

The record discloses absolutely nothing which would indicate that the employer ever considered plaintiffs as supervisors, let alone executives.

It has long been the law, that even supervisors of the lowest grade in the management set-up can bind the employer by acts which constitute unfair labor practices—even where no express authority for the acts is shown: *New Idea, Inc.*, v. *N. L. R. B.*, No. 7631, Feb. 6, 1941, 117 F. (2d) 517; *Oughton* v. *N. L. R. B.*, No. 7336, Nov. 19, 1946, 118 F. (2d) 486; *Quaker State Oil Ref. Co. & Intl. Brother-*

hood Firemen, etc., 27 N. L. R. B. 212; *Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514.

The N. L. R. B. has consistently held that "an employer owes to his employees an affirmative duty to restrain supervisory employees from engaging in union activity or in the formation or administration of company unions;" 2 Teller par. 299; *Ford Motor Co.,* 23 N. L. R. B. 28; *George W. Bollman Co. & Wool Hat Workers of United Hatters (AFL)* Feb. 17 1941, 29 N. L. R. B. 115; *Dupont* v. *N. L. R. B.,* 116 F. 2nd 388.

It is a well established practice for employers confronted with an N. L. R. B. election to instruct all supervisory or management employees not to interfere with or take part in the union organizing campaign and proceedings during the election. We believe that it is greatly significant that the employer here issued no instructions whatever to these plaintiffs during the steelworkers (C. I. O.) organizational drive and election in 1943 (Transcript of Test. 31).

The employer never called plaintiffs into any supervisory meetings (Transcript of test. 38-133-177-242-283-317-377-406-426-450-476-506-554-607).

The employer never confided company policies in the plaintiffs, (Transcript of test. 133-137 and similar testimony of all plaintiffs of record).

The employer never gave plaintiffs any authority to hire (Transcript of test. 134-178-237-315-376-404-425-449-475-506-553-606).

The employer never gave plaintiffs any authority to discharge (Transcript of test. 133-178 and similar testimony of all plaintiffs of record).

The employer never gave plaintiffs authority to set a production employee's rate or to change a rate (Transcript of test. 132-176 and similar testimony of all plaintiffs of record).

The employer never gave plaintiffs authority to keep merit ratings on other employees (Transcript of test. 134-177 and similar testimony of all plaintiffs of record).

The employer never instructed plaintiffs on personal policies or handling of men (Transcript of test. 133-177 and similar testimony of all plaintiffs of record).

The employer never authorized plaintiffs to discipline other employees (Transcript of test. 135-178 and similar testimony of all plaintiffs of record).

The plaintiffs were not endowed with authority to disapprove of an operator's production. Inspectors (hourly rated) actually had to approve the operators' work, and could reject the work of plaintiffs.

The plaintiffs had no jurisdiction over laborers or helpers or chainmen working with them (Transcript of test. 135-960-962-964).

The employer never gave the plaintiffs authority to promote or demote any other employees (Transcript of test. 134 and similar testimony of all plaintiffs of record).

The plaintiffs were never even told they were to be "foremen" when they were put on salary (Transcript of test. 132 and similar testimony of all plaintiffs of record).

The plaintiffs were never even told the rates of the operators in the group in which they worked (Transcript of test. 132 and similar testimony of all plaintiffs of record).

When some of the plaintiffs assumed authority, they were reprimanded (Transcript of test. 160-617-618).

Actually plaintiffs were skilled, technical aids to operators of machines on which they had been trained.

Plaintiffs' only function in the machine groups in which they worked, was to aid machine operators in reading blueprints, setting-up jobs, procuring tools or materials, and in operating machines, a substantial part of the work being manual in nature.

Actually, when the jobs were assigned to plaintiffs, they were kept on an hourly rate basis which indicates that the company actually considered plaintiffs in the same class as skilled production employees (Defendant's Exhibit Q).

The job duties were in no way changed when plaintiffs were placed on salary (Defendant's exhibits C through P.).

The plaintiffs never had knowledge of company methods of handling employee grievances, and were never given authority to settle grievances (Transcript of test. 132-137 and similar testimony of all plaintiffs on record).

The plaintiffs were actually under regular supervision themselves (Transcript of test. 85).

Hourly rated foremen had greater authority than plaintiffs (Transcript of test. 906-962-964) and they are not exempt under the Regulations, not being on salary.

The earnings of plaintiffs were for less than those of production employees, on the basis of the highest hourly rate of $1.71 proved in the case (Transcript of test. 664), plus time-and-one-half for overtime, in excess of two hours bonus daily, plus shift differentials.

The Plaintiffs Are Not Executives, Even Though Called "Foremen" by the Company

It is well established that a job title is not controlling in the determination of whether an employee is an executive under the Act.

The job duties determine the employee's status with respect to receiving benefit of the Act.

And "office manager-treasurer-director," who actually was the bookkeeper of the company, was held not to be exempt: *Lawley* v. *South*, 322 U. S. 746, 140 F. 2nd 439.

A chief engineer and superintendent of foremen was held non-exempt, even though he exercised many executive duties, and was on a monthly salary where a large percent-

age of his work was manual: *Wagner* v. *American Service Co.*, 58 F. Supp. 32.

Also held non-exempt generally, are "working foremen". In the case of *Walling* v. *Sun Publ. Co.*, 47 F. Supp. 180 (affd. later by U. S. Supreme Ct. . . .) even though the foremen had authority to hire and fire, where they were "working foremen" they were held non-exempt.

In the case of *Schmidt* v. *Emigrant Industrial Sav. Bank*, 148 F. 2nd Circ., a building superintendent, with 5 elevator operators, a porter and a night watchman under him, with authority to recommend hiring or firing and change status of employees, was held not exempt under the Act, because he also did manual work, oiling the elevator machinery, inspecting contacts, sprinkler system, valves, toilets, etc.

This case holds that all 6 elements of exemption "must" be shown (in the conjunctive) to exempt an employee from the act as an executive; the case follows: *Fanelli* v. *U. S. Gypsum Co.*, 2 Cir. 141 F. (2d) 216; *Helliwell* v. *Haberman*, 2 Cir. 140 2d 833; *Smith* v. *Porter*, 8 Cir. 143 F. (2d) 292.

The appropriateness of defining "bona fide executive" in the terms of one whose primary duty consists of management, who customarily and regularly directs the work of others, and who customarily and regularly exercised discretionary powers, is apparent without discussion. The general acceptance of this definition by the courts is evident from the host of decisions which have denied the exemption where the qualifications prescribed have not been satisfied.

Ralph Knight v. *Mantel*, 135 F. (2d) C. C. A. 8); *Helena-Glendale Ferry Co.* v. *Walling*, 132 F. (2d) 616 (C. C. A. 8); *Walling* v. *Stone*, 131 F. (2d) 461 (C. C. A. 7); *Corey* v. *Detroit Steel Corp.*, 6 Wage Hour Rept. 833 (E. D. Mich. 1943); *Shain* v. *Armour and Co.*, 6 Wage Hour Rept. 715 (W. D. Ky. 1943); *Cohn* v. *Decca Distributing Corp.*, 50 F. Supp. 270 (E. D. Pa. 1943); *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F. Supp. 393 (S. D. Calif.); *Timberlake* v.

Day and Zimmerman, 6 Wage Hour Rept. 537 (S. D. Iowa 1943); *Cron* v. *Goodyear Tire Co.,* 49 F. Supp 1013 (M. D. Tenn.); *Porter* v. *Georgia Power and Light Co.,* M. D. Ga., Civil No. 94, decided May 1943; *Mabee* v. *White Plains Pub. Co. Inc.,* 6 Wage Hour Rept. 437 (Sup. Ct. N. Y. Westchester Co. 1943); *Walling* v. *Emery Wholesale Corp.,* 49 F. Supp. 192 (N. D. Ga.); *Buckley* v. *Rappaport,* 6 Wage Hour Rept. 154 (N. D. Ill. 1943); *Walling* v. *Cudahy Packing Co.,* 6 Wage Hour Rept. 65 (E. D. Tenn. 1942); *Walling* v. *Sun Pub. Co.,* 47 F. Supp. 180 (W. D. Tenn.); *Moss* v. *Postal Telegraph-Cable Co.,* 42 F. Supp. 807 (M. D. Ga.); *Kelley* v. *Yelow Cab Terminal Co.,* W. D. Ky., Civil No. 323, decided June 19, 1943; *Klotz* v. *Ippolito,* 40 F. Supp. 422 (S. D. Tex.); *Barker* v. *Georgia Power and Light Co.,* 5 Wage Hour Rept. 540 (M. D. Ga. 1942); *McClure* v. *Schulze Baking Co.,* 5 Wage Hour Rept. 53 (C. C. Ill., Winnebago Co. 1941); *Schneider* v. *Sports Vogue, 35 N. Y. S. Oil Co.,* 4 Wage Hour Rept. 274 (N. D. Tex. 1941); *Boylan* v. *Linden Mfg. Co.,* 4 Wage Hour Rept. 158 (C. C. Mich. Ingham Co., 1941).

In the present case the blue print and work card "directed" the work of the operators. This is generally admitted. There is absolutely no discretion or judgment reposed in plaintiffs in this regard.

The primary duty of plaintiffs was to help manually or otherwise any operator who required assistance in following the directions prepared by others.

Not a word of testimony appears showing any authority in plaintiffs to modify any blue print or work card. The contrary does appear, undenied. In short, no intellectual duties were ever assigned to or assumed by the plaintiffs.

As the district court said of the operation of radio transmitting equipment in *Walling* v. *Sun Publishing Co.,* 47 F. Supp. 180, affirmed 140 F. (2d) 445, this is "essentially a

mechanical task of a skilled nature." There, as here, the duties were not intellectual but were, in contrast, "skilled mechanical work."

The extent of manual labor performed by employees, however, is not the only factor to consider. If plaintiffs did no manual work they are still not executives under the act. "The mere fact that certain employees are prohibited from doing physical labor does not in itself make them executive employees exempt from wage and hour provisions since their status as executives depends upon other matters than that of labor performed and also upon observance by the employer and employee of the prohibition to labor. *Walling* v. *St. Mary's,* D. C. Pa. 1944, 57 F. Supp. 523.

The National Labor Relations Board has distinguished minor supervisory employees, such as straw bosses, lead-men, set-up men, etc., from supervisors "vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." Thus group leaders with authority to give instructions and to lay out work have been held to be non-management employees; *Pittsburgh Equitable Meter Co.,* 61 N. L. R. B .880; similarly held non-management were supervisors who are mere conduits for transmitting orders; *Richards Chemical Works,* 65 N. L. R. B. 14. Even persons who have the title of "foreman" or "assistant foremen" who have "no authority other than to keep production moving" have been held non-management: *Endicott-Johnson,* 67 N. L. R. B. 1342, 1347.

II. *The Circuit Court decided a Federal question in a manner in conflict with the applicable decisions in this Court in that it sustained the District Court's conclusions of law and fact which were in nowise supported by the evidence, contrary to the decisions of this Honorable Court in the cases of Mid-Continent Investment Co.* v. *Mercoid Corp., 320 U. S. 661; Automatic Maintenance Mach. Co.* v. *Precision Instrument Mfg. Co., 324 U. S. 806; Stern* v. *Harrison 152 Fed. 2d 521, cert. den. 66 S. Ct. 967, and other cases.*

Since the Courts are bound to accept the definitions of the Administrator; and since the expert testimony is acceptable to the Administrator for the purpose of applying the definitions more accurately, it is submitted that such testimony would be helpful to the Court as well as for this purpose; and the refusal of the trial judge to accept evidence of this type is certainly prejudicial to plaintiffs.

The Findings and Conclusions of the Trial Court Are Not Based upon Substantial Evidence

It is generally held that the office of the "findings of fact by a trial court sitting without a jury, is to distill from the evidence adduced at the trial of a disputed issue the pertinent facts which must be known by the court in order to enable it to determine and apply the relevant rules of law and thereupon to grant appropriate relief to the litigants. *Hartford-Empire Co.* v. *Shawkee Mfg. Co.*, C. C. A. Pa. 1944, 147 F. 2d 532.

Where facts are not in dispute, legal deductions and conclusions of law drawn by the District Court, while worthy of great consideration, are not binding on the Circuit Court of Appeals. *Stubbs* v. *Fulton Nat. Bank of Atlanta*, C. C. A. Ga. 1945, 146 F. 2d 558, Cert. den. 325 U. S. 864. In re

Chicago & N.W. Ry. Co., 110 F. 2d 425; *Crutcher* v. *Joyce*, C. C. A. N. M. 1945, 146 F. 2d 518.

Where the district judge on a non-jury case made ultimate findings without making detailed findings of fact, he erred. *Knapp* v. *Imperial Oil & Gas Products Co.*, C. C. A. W. Va. 1942, 130 F. 2d 1; *Brooks Bros.* v. *Brook Clothing of Ca.*, D. C. Cal. 1945, 5 F. R. D. 14.

A Circuit Court of Appeals is not bound by the findings of fact of a District Court where they are not supported by substantial evidence; neither is the appellate court bound by conclusions drawn from unsupported findings. *Mid-Continent Inv. Co.* v. *Mercoid Corp.*, C. C. A. Ill. 1943, 133 F. 2d 803, 320 U. S. 661; *Automotive Maintenance Machinery Co.* v. *Precision Instrument Mfg. Co.* C. C. A. Ill. 1944, 143 Fed 2d 332, 324 U. S. 806; *Stern* v. *Harrison*, C. C. A. Ill. 1945, 152 F. 2d 321, cert. den. 66 S. Ct. 967.

The learned Trial Judge failed to make specific findings with regard to each plaintiff on the several elements necessary to constitute each plaintiff an "executive" so as to be exempt from the benefits of overtime compensation under the Act.

It is respectfully submitted that not a single plaintiff was shown to possess all the qualifications required by the Administrative ruling. The several findings of fact refer to record testimony as to some but not all plaintiffs, on important elements which are absolutely necessary in every case.

Even were all the "executive" elements present in the collective testimony of the plaintiffs, it is submitted that unless all elements were affirmatively established as to *each* plaintiff, defendants have failed in their burden of proof to establish the exemption.

III. *The Circuit Court erred in affirming findings and conclusions of the District Court which in effect restrict the applicability and benefits beyond the intent of the Act and of the regulation of the Wage and Hour Administrator as declared in Sec. 541.1 of 29 Code of Federal Regulations, and contrary to the express principles declared by this Honorable Court in United States* v. *Darby, 312 U. S. 100, 109; Fleming* v. *A. B. Kirschbaum Co., 312 U. S. 517; and Phillips Co.* v. *Walling, 324 U. S. 490.*

The Fair Labor Standards Act is a remedial statute of general application. Its purpose is to establish basic wage and hour standards "for health, efficiency, and general well-being of workers "engaged in interstate commerce or in the production of goods for interstate commerce, Section 2(a); *United States* v. *Darby,* 312 U. S. 100, 109. Being "remedial legislation," the Act "should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended." *Piedmont & Northern Ry.* v. *Interstate Comm.,* 286 U. S. 299; *Spokane & Inland R. R. Co.* v. *United States,* 241 U. S. 344, 350; *Bowie* v. *Gonzalez,* 117 F. (2) 11, 16 (C. C. A. 1); *Fleming* v. *Palmer,* 123 F. (2) 749, 762 (C. C. A. 1), certiorari denied, 316 U. S. 662; *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. (2d) 52, 56 (C. C. A. 8); *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101, 106 (C. C. A. 9); *Fleming* v. *A. B. Kirschbaum Co.,* 124 F. (2d) 567, 572 (C. C. A. 3), aff'd 316 U. S. 517.

This principle was affirmed in *Phillips Co.* v. *Walling* (Decided March 26, 1945), 324 U. S. 490 where the Court said:

> "The Fair Labor Standards Act was designed to extend the frontiers of social progress, by insuring to all our able-bodied working men and women a fair day's

> pay for a fair day's work''—Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.''

Applying the principles thus laid down to the case at bar, where the *undenied* proof negatives any inferences or insinuations of intended authority over other employees, it is inconceivable that defendants could be sincere in referring to plaintiffs as ''executives'' or ''administrative officers,'' merely because they were loosely referred to as ''foremen.''

Certainly plaintiffs have met the burden of proof required of them to establish their right to participate in the benefits of the Act, even without a ''liberal'' construction thereof.

Conversely, it is submitted that defendants, even were they not required to prove an exemption by a ''clear preponderance of the evidence,'' under a narrow and strict construction of the terms ''executive'' or ''administrative'' officer, have *failed to deny the lack of executive authority in plaintiffs.*

Even where there is control over other employees, the courts have denied the claimed exemption. In *Moss* v. *Postal Telegraph-Cable Co.*, 42 F. Supp. 807 (M. D. Ga.), the manager of a branch office who directed the work of other employees but had no authority to hire and fire was held not an executive. See also, *Timberlake* v. *Day & Zimmerman, Inc.*, 49 F .Supp. 28 (S. D. Iowa) (captain of plant guards); *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W. D. Ky.) (''key men'' or working foremen); *Corey* v. *Detroit Steel Corp.*, 52 F. Supp. 138 (E. D. Mich.) (night superintendent of maintenance); *Fellabaum* v. *Swift & Co.*, 54 F. Supp. 353 (N. D. Ohio) (shipping clerk supervising intra-

state distribution of meat packing plant); *Walling* v. *St. Marys Sewer Pipe Co.*, 56 F. Supp. 345 (W. D. Pa.) (kiln foremen); *Simmons* v. *Straight Improvement Co., Inc.*, 7 Wage Hour Rept. 1060 (S. D. N. Y.) (superintendent of loft building); *Distelhorst* v. *Day & Zimmerman*, 58 F. Supp. 334 (S. D. Iowa) (building foremen, chief clerk, yard foremen); *Pakarinen* v. *Butler Bros.*, 16 N. W. (2d) 769 (Sup. St. Minn.) (shift boss of mine).

Certainly the defendant cannot rely on the testimony of record to establish the "strict" or "narrow" definitions of "bona fide executive" or "administrative capacity." It is well established that all six elements of the restrictive definition "bona fide executive" must be proved by the "clear preponderance of the testimony;" yet the record is devoid of any proof that plaintiffs' "primary duty consists of the management" or any "recognized department or subdivision thereof," as required by the very 1st of the six restrictive elements of the definition. On the contrary, the defendant has even failed to establish that plaintiffs were assigned to a "recognized"—subdivision of a department, as required (Transcript of test. 63-64-65-66).

Element (D) of the Administrator's definition, was not only proved by defendant, but as the record stands, the plaintiffs have definitely and affirmatively negatived the possession of "discretionary" powers; while the defendant's general superintendent, Mr. J. R. Berg, called as for cross-examination, further strengthen this position of plaintiffs by showing in what other officers all authority and discretion were reposed.

As to element (B) of the definition, the evidence is overwhelming that the only time plaintiffs were called upon to "direct" the work of other employees is when they ran into difficulty. Certainly this is not the measure of direction termed "customarily and regularly" by the definition.

We believe that plaintiffs have positively established a lack of authority to hire, fire, or recommend same, or authority to advance and promote or effect other changes in status of employees, as required by element (C) of the definition. Their authority as to recommendations was no different than that of a regular machine operator, according to the testimony of Mr. Berg, defendant's general superintendent. (Transcript of test. 70)

The positive, undenied proof of record dispels any doubt that plaintiffs actually worked from 25% to 100% of the time on work similar in nature to that of other employees. Therefore element (F) of the definition of executive is not available to defendant.

In short, faced with the burden of establishing positively all six elements of the definition by a "clear preponderance of the testimony," defendant's case has failed to establish five out of the six elements necessary to exempt an employee as a "bona fide executive."

Of course, the burden is on the employer to prove an exemption "by the clear preponderance of the testimony:" *Smith* v. *Porter*, 143, F. 2nd 292; *Cohn* v. *Decca*, 50 F. Supp. 270; *Helliwell* v. *Haberman*, 140 F. (2d) 833; *Parkarinen* v. *Butler*.

The employer must show all 6 conditions present before claiming "executive" exemptions: *Fanelli* v. *U. S. Gypsum Co.* 141 F. (2d) 216.

IV. *The Circuit Court erred in finding that the record supported the findings and conclusions of the District Court declaring plaintiffs to be "executives" exempt from overtime benfits of the Fair Labor Standards Act of 1938, as such term is defined by the Wage and Hour Administrator, 29 Code of Federal Regulations Sec. 541.1, 5 F. R. 4077.*

The 7th finding of fact by the trial court is as follows:

> "During the foregoing periods of time the recommendations and suggestions of the plaintiffs as to advancement and promotion of other employees were given particular weight. (N. T. 134, 351, 531-33, 570)"

The 9th finding of fact by the trial court is as follows:

> "During the foregoing periods of time each of the plaintiffs customarily and regularly exercised discretionary powers. (N. T. 127-8, 192, 156, 240, page references in Requests for Findings 5-8).

Each of the findings refers to *all* plaintiffs (and each finding is absolutely necessary to support the conclusion that plaintiffs are executives); yet the court refers to testimony of only four of the fourteen plaintiffs in each instance; and nothing in the record supports the findings, as to the remaining ten plaintiffs in each instance.

The Circuit Court disregarded the absence of any evidence of record to support the 7th and 9th findings of fact in the case of 10 plaintiffs in each instance, and affirmed the findings of the District Court as if there were "substantial evidence" in support of the findings.

V. *The decision of the Circuit Court is in conflict with the decisions of other Circuit Courts and with the applicable decisions of this Honorable Court in defining "executives" who cannot claim the benefits of overtime compensation under the Fair Labor Standards Act of 1938.*

The cases and argument relied upon are covered under Argument III in this brief.

VI. *The Circuit Court erred in finding that there is "substantial evidence" in the record to support the District Court's finding that plaintiffs' primary duty consisted of the management of a "customarily recognized department or subdivision thereof."*

Contrary to the 5th finding of fact by the trial court, sustained by the Circuit Court, the "departments" were "managed" by other employees on the same shift with plaintiffs.

All witnesses agreed that the "shift," "turn", or "general" machine shop foreman were actually "in charge" of the department.

Under the testimony of defendant's witness Berg, General Superintendent of the machine shop, the shift foremen were endowed with all recognized attributes of "foremen" —they could discharge, suspend, discipline or transfer employees; they were called into supervisory meetings with management; company policies were discussed with them; they could and did grant increases; they were customarily and regularly in charge of the personnel and work of the employees of the machine shop on their shifts—in short, they "managed" the department in the truest sense of the word. These are the men (Kraus, Machesky, Yoezie) whom management entrusted with the obligations of executing company policies in the department. These are the men

who are the "Executives" exempted from the benefits of the act.

It is noteworthy that:

A. NOT A SINGLE ONE OF THESE MEN WAS OFFERED AS WITNESS TO SUPPORT THE BARE ASSERTION THAT "RECOMMENDATIONS" TO THEM BY PLAINTIFFS WOULD HAVE "PARTICULAR WEIGHT."

B. ALTHOUGH PRESENT IN THE COURTROOM THROUGHOUT THE TESTIMONY OF PLAINTIFFS, SHIFT FOREMAN KRAUS FAILED TO TAKE THE STAND TO DENY THE POSITIVE AVERMENTS BY PLAINTIFFS THAT HE NEVER EVEN TOLD THEM THEY WERE TO BE CALLED "FOREMEN" WHEN THEY WERE ASSIGNED TO THEIR JOBS.

In view of these facts, it is respectfully submitted that the Honorable Court may assume that had the witnesses been called, their testimony would have corroborated plaintiffs.

VII. *The Circuit Court erred in finding that there is "substantial evidence" in the record to support the District Court's finding that plaintiffs "customarily and regularly direct the work of other employees therein."*

The 5th finding of fact, has been previously referred to under Argument VI.

VIII. *The Circuit Court erred in finding that there is "substantial evidence in the record to support the District Court's finding that plaintiffs' "recommendations as to discharge or advancement."*

The 7th finding of fact, unsupported as to 10 of the 14 plaintiffs, has been previously referred to under Argument IV.

IX. *The Circuit Court erred in finding that there is "substantial evidence" in the record to support the District Court's finding that plaintiffs did "customarily and regularly exercise discretionary powers."*

The 9th finding of fact, unsupported as to 10 of the 14 plaintiffs, has been previously referred to under Argument IV.

X. *The Circuit Court erred in finding that there is "substantial evidence" to support the District Court's findings that none of the plaintiffs did work of the "same nature as that performed by non-exempt employees" more than twenty per cent of the time worked by the non-exempt employees in a work-week.*

The plaintiffs performed work of a similar character to production employees from to 2 to 8 hours per day (Transcript of test. Gill—130; Wilson—182; Wilson—242; Carlson—270; Ely—287½; Daugherty—320; Mayer—382; Britton—410-11; Menking—430; Petrichek—456; Weir—479; Hornfeck—503-4; O'Shell—547-8; Hill—600).

Defendant admits that from 30 to 40 hours a month plaintiffs actually worked machines (Transcript of test. 73); while more time was admittedly spent in bringing tools, jigs, drawings and other devices to the operators (Transcript of test. 73).

Under the circumstances, even were plaintiffs actually given other executive authority as foremen, they would still not be exempt from the Act under Sec. F of the Regulation definition of "executive."

XI. *The Circuit Court's decision relieves trial courts from the obligation imposed by the Administrator to consider union practices in determining executive status of employees, contrary to the decisions of this Honorable Court in construing the effectiveness of administrative regulations in United States v. Bush & Co., 310 U. S. 371, 380; Gray v. Powell, 314 U. S. 402; and in conflict with the decisions of other Circuit Courts, such as Knight v. Mantel, 135 F. (2d) 514 (C. C. A. 8); Joseph v. Ray, 139 F. (2d) 409 (C. C. A. 10); Lawley & Son Corp. v. South, 140 F. (2d) 439 (C. C. A. 1).*

In determining whether or not an employee is in a "management" or "labor" status, the Wage and Hour administrator has considered the union practice with regard to the employee in question.

In the official Department of Labor Wage and Hour Division's Report and Recommendations of the Presiding Officer on "Executive, Administrative, Professional • • • Redefined," effective October 24, 1940, the Administrator rules that:

> "It should be noted, of course, that for obvious reasons labor unions normally exclude from their membership and from the provisions of their collective bargaining agreements persons employed in a bona fide executive capacity. Frequently, union agreements also exclude other employees who have a direct relationship to management even though it be of an admittedly non-executive type. For this and other reasons union practices constitute a useful guide but cannot be taken as determinative in the problem of definition."

Plaintiffs' offers to show organized labor experts' views on the status of plaintiffs were rejected by the learned Trial Court, on objection by counsel for defendants (Transcript of test. 654-658-673-674). The offers were made for no other

purpose than that for which they would have been accepted by the Administrator in attempting to arrive at a decision concerning the management status of an employee.

Since the Courts are bound to accept the definitions of the Administrator; and since the expert testimony is acceptable to the Administrator for the purpose of applying the definitions more accurately, it is submitted that such testimony would be helpful to the Court as well for this purpose; and the refusal of the trial judge to accept evidence of this type is certainly prejudicial to plaintiffs.

WHEREFORE, it is respectfully prayed that this Honorable Court may issue a writ of certiorari ordering that this record may be certified to this Honorable Court for its consideration and review.

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Pro Se.

HARRY ALAN MERMAN,
Attorneys for Petitioners.

(6024)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

NO. 752

EDWARD J. GILL, FRANK C. MENKING, JAMES A. HILL, WILLIAM BRITTON, DONALD M. WILSON, GEORGE F. ELY, ALBERT A. PETRICHEK, JOSEPH C. HORNFECK, JOHN J. SCHUBERT, WILBERT J. MAYER, HERMAN C. CARLSON, CLINTON O'SHELL, SR., WALTER T. WEIR, JOHN P. DAUGHERTY,
Petitioners,

v.

MESTA MACHINE COMPANY, a Corporation,
Respondent.

BRIEF OF MESTA MACHINE COMPANY, OPPOSING THE PETITION FOR CERTIORARI.

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OPINIONS OF THE COURT BELOW.

The Opinion of the United States Circuit Court of Appeals for the Third Circuit, filed January 21, 1948 (R. 424), is reported as *Gill, et al. v. Mesta Machine Company,* 165 Fed. (2d) 785.

This decision of the Circuit Court of Appeals affirmed the Findings of Fact, Conclusions of Law and judgment comprising the decision of the case by the United States District Court for the Western District of Pennsylvania, handed down February 20, 1947 (R. 9b-23b), and reported as *Gill, et al. v. Mesta Machine Company,* 69 Fed. Supp. 904.

JURISDICTION OF THIS COURT.

This Court has jurisdiction to grant or deny the writ of certiorari under Section 240 of the Judicial Code, as amended (28 U.S.C. 347).

COUNTER-STATEMENT OF THE CASE.

This is an action at law brought in the United States District Court for the Western District of Pennsylvania by a group of fourteen individual employees to recover overtime compensation and liquidated damages alleged to be recoverable from the defendant by virtue of the provisions of Section 16 of the Fair Labor Standards Act of 1938.[1] To the Complaint (R. 1b-3b), the defendant-employer filed an Answer which claimed the benefit of the six-year Pennsylvania Statute of Limitations (a partial defense thereafter conceded by the plaintiffs) and which raised also, as an affirmative defense to the whole of the claim, the contention that the plaintiffs had, at all material times, been employed as foremen and at work of such an executive and administrative character as had exempted their employment from the scope and effect of the Fair Labor Standards Act, under Section 13 (a) thereof and the applicable Regulations of the Wage and Hour Administrator (R. 3b-4b).[2]

This latter averment of the Answer raised the single issue which was tried and determined by the District Court. In all the proceedings in that Court, the issue was treated by the Court as an issue of fact. This view had the approval of all parties: the plaintiffs, as a group, and the defendant concurred in representations to the Trial Judge that the tests of exempt "executive" or "administrative" status under Section 13 of the Act were

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[1] Act of June 25, 1938, c. 676; 52 Stat. 1060; 29 U.S.C. 216, etc.).

[2] "Regulation 541.1": 29 Code of Federal Regulations, Section 541.1; 29 App. U.S.C. 541.1; 5 Fed. Reg. 4077.

those prescribed by the Administrator's Regulation 541.1.

Under that Regulation, an employee is an "executive," and his employment is not subject to the Wage and Hour provisions of the Act, if he is an employee

> "(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and
>
> "(B) who customarily and regularly directs the work of other employees therein, and
>
> "(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and
>
> "(D) who customarily and regularly exercises discretionary powers, and
>
> "(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and
>
> "(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment."

As an examination of the record will show, the defendant assumed the burden of showing that the plaintiffs were exempt "executives" under the definition so

provided by Regulation 541.1. The Court ultimately determined, from a consideration of all of the evidence—including in particular certain testimony of the plaintiffs themselves which is printed in the transcript filed here—that each of the plaintiffs had, at all material times, held employment which had the six controlling characteristics prescribed by the Regulation.

Thus, the Trial Judge found, as matters of fact, that each of the plaintiffs had, at all material times, been employed as the foreman of some customarily recognized department of the defendant's machine shop, and had been, as such, charged with the primary duty of managing that department (R. 10b-14b); that, as a foreman, each of the plaintiffs had customarily and regularly directed the work of other employees in his department (R. 11b); that each of the plaintiffs had been responsible, as a foreman, to make recommendations concerning the promotions, discharges and other changes of status of his subordinates, which recommendations were given particular weight by his superiors in the defendant's management (R. 11b); that each of the plaintiffs had, in the management of his department, been required to exercise discretionary powers—to decide from hour to hour and from day to day what his subordinates should do, and how they should do it (R. 11b); that each of the plaintiffs had been compensated for his services on a salary basis of more than $30.00 per week (R. 12b-14b); and, finally, that, during his material periods of service as such a foreman, none of the plaintiffs had performed work of the same nature as that performed by non-exempt employees in the shop, for hours exceeding twenty per cent. of the number of hours worked in the same work-week by his own non-exempt subordinates (R. 14b).

Concerning the background of facts of the case, and concerning several of the six points of exempt status so found by the Trial Judge, there was no dispute. And in the area where disputes existed, the evidence was more than amply sufficient to support and warrant the Trial Judge's findings.

As to the background, it was shown without dispute that the defendant-employer, the Mesta Machine Company, had been engaged for more than forty years in the business of manufacturing heavy machinery, of the types used by steel companies and other metal manufacturing establishments for rolling and working steel and other metals, at a plant in West Homestead, a suburb of the City of Pittsburgh, Pennsylvania (R. 42b). It was shown that the productive facilities of the West Homestead plant consisted principally of a foundry, a machine shop and an erection department, adapted to the manufacture, machining and assembly of the huge castings and the other parts, some of them extremely large and heavy, which are used in such rolling mills, shears and other complicated machines, as the Company makes for its customers (R. 27b, 34b-36b; Ex. A, R. 425b; Ex. Z, R. 467b; etc.).

During the recent war, and the period of defense preparation which immediately preceded it, the Company's manufacturing facilities had been used largely for war purposes, not only to continue the manufacture of the Company's normal products, but also to produce military and naval guns, and other munitions and war materials (R. 40b-41b; 44b-45b). To meet the additional and sometimes excessive demands imposed upon it by this development of its business, the defendant had added new and additional buildings and departments to

its machine shop, and had greatly enlarged the force of individuals employed there. To provide management for the new departments and enlarged operations, it had promoted to positions as department foremen numerous machinists of long experience, amongst them thirteen of the fourteen plaintiffs. Herman G. Carlson, the fourteenth and remaining plaintiff, had been promoted to his position as a foreman many years before.

During a relatively brief period after his advancement, the appointment of each machinist so promoted to be a foreman was a provisional or probationary one. During his service as a probationary foreman, each appointee was paid at an hourly wage rate, and was allowed the overtime compensation prescribed by the Fair Labor Standards Act. From and after the end of his probationary period, and his permanent appointment as a foreman, each appointee was paid a monthly salary, which yielded substantially greater compensation than that previously paid him, but which included no specific allowance for overtime hours. Plaintiffs' claims for additional compensation related wholly to those periods of time during which they had, respectively, served as permanently appointed, salaried foremen. The histories of the probationary and permanent appointments of the fourteen plaintiffs, as they are shown by the evidence,[3] may be tabulated as follows:

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[3]Probably as a result of inadvertence, the transcript of the record served on this respondent includes only Volume 1 of the two-volume printed appendix which was filed with the Circuit Court of Appeals. Volume 2 of the appendix contains copies of all of the material exhibits, including those which summarize the employment histories of the fourteen petitioners. If Volume 2 has not been filed with this Court, the record here is incomplete.

Exhibit App.		Name	Wage Rate as Machinist	Promoted to Probationary Foreman: Date	Promoted to Probationary Foreman: Wage Rate	Promoted to Salaried Foreman: Date	Promoted to Salaried Foreman: Monthly Salary
H	439b	Herman G. Carlson	$0.85			9- 1-34	$225-$525
J	443b	John J. Schubert	1.04	7- 1-40	$1.25	10- 1-40	300- 425
F	435b	William Britton	1.20	4- 1-41	1.41	7- 1-41	363- 525
K	445b	Edward J. Gill	1.20	4- 1-41	1.41	7- 1-41	363- 525
N	451b	Thomas P. Daugherty	1.19	5-16-41	1.41	10- 1-41	363- 425
O	453b	James A. Hill	1.14	5-16-41	1.41	10- 1-41	363- 425
I	441b	Albert A. Petrichek	1.14	7- 1-41	1.41	10- 1-41	363- 525
G	437b	Joseph C. Hornfeck	1.19	8-16-41	1.41	1- 1-42	425
M	449b	Walter T. Weir	1.08	9-16-41	1.41	1- 1-42	425
P	455b	Frank C. Menking	1.14	10-16-41	1.41	1- 1-42	425
D	431b	George Ely	1.25	9-16-42	1.47	1- 1-43	425
C	429b	Clinton O'Shell	1.36	9-16-43	1.47	1- 1-44	425- 525
E	433b	Wilbert J. Mayer	1.25	10- 1-43	1.47	1- 1-44	425
L	447b	Donald M. Wilson	1.20	10-16-43	1.47	1- 1-44	425

According to the testimony of the plaintiffs themselves, each of them, from the moment he became a foreman, was put in charge of a department or division of the defendant's machine shop, consisting of a particular group of machines, permanently located in a particular building or buildings.

Defendant's management organization chart appears in the Record as Exhibit Z (R. 467 b). The machine shop organization appears on the left half of this chart. As the chart shows, the entire shop was directed by P. Grant, the Superintendent, assisted by two General Foremen of the entire operation: E. Yoezle and H. Machesky. Under these men, the shop was subdivided into a number of departments. Amongst them, and shown on the chart, are six departments which figure in this case. Three of these six, the "Small Aisle", the "Upper End" and the "Lower End" have been in existence for twenty-five years or more (R. 35 b; 37 b-39 b). Two others, the "900-foot Extension" and the "280-foot Extension" were built and established between 1940 and 1942 (R. 28 b), and are sometimes referred to collectively as the "New Shop" (see R. 165b; 206b; 288 b). The remaining general division is called "Ordnance" throughout the testimony. It was built early in the recent war, in 1941 and 1942 (R. 40 b), and is divided into two parts or physical subdivisions: the Lower End, equipped with forty-two planers, presses and similar machines, and the Upper End, equipped with thirty-two gun lathes and ten other machines (R. 40 b-41 b).

The testimony of John A. Berg, defendant's General Superintendent, described these subdivisions of the machine shop. Each of the plaintiffs, in his testimony, either declared or admitted that during all material

periods of his service as a foreman, he had been the "boss" of one of the subdivisions so described by Mr. Berg, and had been responsible to direct and supervise the work of the journeymen machinists employed therein. The testimony on these points, so given by Mr. Berg and by the plaintiffs, is summarized in tabular form on page 10, *infra*.

As foreman or "boss" of his department, each of the plaintiffs was resposible to higher management for the execution, during each day, of the manufacturing operations which has been assigned to that department. He was required to maintain the flow of work and materials to each machine (R. 73b-74b; 387b; 36b, etc.); to see that each machine was always adequately manned; and, largely by answering questions and solving problems which proved too difficult for his subordinate journeymen—and nearly always by the exercise of discretionary powers and authority, to prevent interruptions and to maintain the satisfactory production of acceptable work (R. 352b; 366b-367b; 390b, 398b, 400b, etc.).[4]

It was not disputed that the monthly salaries paid to the plaintiffs were computed at rates far greater than the minimum of $30.00 per week required by the Regulation. As is shown in the tabulation printed on page 7 above, they ranged from $225 to $525.

Finally, as was shown by their own testimony, none of the plaintiffs ever operated a machine himself, or did directly productive work of any kind himself, except for

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[4] See also R. 97b-104b; 343b; 127b; 201b; 217b; 229b-230b; 257b-259b; 294b-297b; 340b; 343b; 354b; 365b-357b; 375b; 381b; 389b; 394b; 406b; 418b-419b; 420b, etc.

Berg's Testimony App.	Name of Department	Number of Machine Tools	Value of Machine Tools	No. of Employees J—"Journeyman" H—"Helper"	Plaintiffs in Charge	Plaintiff's Testimony App.
37 b-38 b; 44 b	Small Aisle (40 yrs. old)	41	$ 320,000	41 J 20 H	Carlson Petrichek Schubert	144 b-145 b 237 b-238 b 94 b
35 b-36 b	Upper End (25 yrs. old)	33	800,000	33 J 36 H	Britton Hornfeck	222 b-223 b 272 b
39 b	Lower End (25 yrs. old)	38	700,000	38 J 26 H	Wilson	129 b
26 b; 29 b-30 b; 33 b-35 b	280-foot Extension (New Shop-1940)	16	450,000	16 J 17 H	O'Shell Ely Mayer	288 b; 290 b 157 b 201 b-208 b
38 b	900-foot Extension (New Shop-1941-42)	21	900,000	21 J 19 H	Gill	64 b; 59 b; 71 b; (cf. 165 b)
41 b	Ordnance (1941-42)					
	Upper End	32	1,200,000	42 J 23 H	Daugherty Hill	177 b 306 b-308 b
	Lower End	42	530,000	42 J 22 H	Weir Menking	257 b 229 b

one of two purposes: either to demonstrate to a subordinate how the subordinate should do his work, or else—and more rarely—to extricate the work in progress upon a machine from some critical situation, in an emergency, with which the journeyman machine operator was unable to cope (R. 240b; 77b-79b; 128b; 107b-108b, etc.).[5]

In short, the evidence in the case, beyond any question, supported and justified the findings of the Trial Judge that the employment of each of the fourteen plaintiffs, at all material times, had met each of the six tests of exempt executive status laid down by Regulation 541.1. The District Court refused to consider any test of executive status other than those prescribed by the Regulation. In keeping with this view of the law and with the Trial Judge's findings of fact, it held that the plaintiffs had been exempt "executives," and that they were, therefore, entitled to no overtime compensation under the Act. It therefore entered a decree dismissing the Complaint (R. 23b).

On their appeal to the Circuit Court of Appeals, the plaintiffs conceded that the Administrator's Regulation, so relied upon by the District Court, had afforded the proper test of their executive status, alleged by the defendant. This view of the law, again concurred in by the defendant, was accepted by the Circuit Court; and, after a consideration of the record as a whole, that Court concluded that the evidence was amply sufficient to sustain the findings of the District Court. Accordingly, the judgment of the District Court was affirmed (R. 424-425).

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[5]See also R. 128b; 135b; 240b; 259b; 338b; 340b-341b; 349b; 351b 352b-354b; 357b-358b; 366b-367b; 375b-376b; 383b-384b; 387b; 390b-391b; 394b-395b; 397b-398b; 400b; 403b; 410b; 415b-416b; 421b-422b, etc.

ARGUMENT.

I. The Case Involves No Question of Federal Law Which Has Not Been Settled by This Court.

As will have been observed, in both the District Court and the Circuit Court of Appeals, the parties deliberately presented this case as one which must turn upon the decision of a question or questions of fact, and which involved the decision of no important question of law. Both sides agreed, that is, that if the employment of the plaintiffs had possessed the characteristics described in the six paragraphs of Regulation 541.1, then the plaintiffs had been, as the defendant contended, exempt executives, and could recover nothing in such a suit. This approach was manifestly correct.

If it was true, as both parties evidently believed at every earlier stage of the case, that the Regulation provided the only applicable definition of the phrase "executive capacity," as it is used in Section 13 of the Act, it must follow that the only question validly presented in the District Court was that of determining whether or not the employment of each of the plaintiffs had possessed the characteristics described in the Regulation. And that question was, of course, a question of fact.

In the Statement of the Case contained in their petition for certiorari (pp. 3-5), the plaintiffs have made twenty-three separate assertions of fact concerning the nature of their employment. A few of these simply contradict the evidence and the findings of fact made by The Trial Judge. The others can have no meaning unless they be intended to provide tests of exempt "executive" status entirely different from those laid down by Reg-

ulation 541.1. Thus, the petition asserts, for example, that, as foremen, the plaintiffs had "nothing to do with placing of machines in the shop"; and that "the scheduling of production is done by the superintendent and not by the plaintiffs"; and that a general foreman of the entire machine shop had authority superior in some respects to their own; and that "labor relations bargaining through union representatives was carried on" by Mr. Berg, as the general manager or superintendent of the whole plant, and not by the plaintiffs. Many of the twenty-three assertions are either not true or not wholly true, but it makes no difference here whether they are true or not; for they are almost wholly irrelevant. Regulation 541.1 does not require, for example, that every exempt executive shall determine what machines shall be installed in his employer's establishment, or that he shall be in charge of the scheduling of production, or that he shall be the supreme authority in the establishment, or that he shall be empowered to make the employer's bargain with subordinate employees. Instead, the Regulation makes the six tests described above the sole tests of exempt executive status, and so makes immaterial all such collateral circumstances as those asserted here by the plaintiffs.

The correctness of the view of the Regulation taken by the District Court is not open to dispute. In *Walling v. General Industries Company,* 330 U.S. 545, 550 (1947) —a case overlooked and not mentioned in the petition for certiorari here—this Court considered and approved Regulation 541.1; recognized that the determination of the exempt and non-exempt status of any particular individual under that Regulation is wholly a determination of fact; and applied the rule that the findings of a Trial

Judge concerning any such matter of fact, if they are based upon adequate evidence, must be sustained and affirmed by the appellate Courts:

> "The District Court, having made findings substantially as stated above, proceeded to make additional findings of the existence of each of the facts on which an executive status, as defined by the Regulations, is made to depend.
>
> "We believe that the evidentiary facts afford an adequate basis for the inferences drawn by the Court in making such additional findings. At the least, we think that in drawing such inferences the Court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed. The Circuit Court of Appeals' rejection of those findings cannot rest on the conflicting testimony of petitioner's witneses. The District Court heard the witnesses, and was the proper judge of their credibility."

II. Under Established Principles, This Court Will Not Review the Decision of the Issues of Fact Presented by This Case.

By the petition for certiorari presented here, the plaintiffs in effect pray that this Court shall review the evidence as a whole; that, having reviewed this evidence, it shall hold that the decision of the issue or issues of fact, reached by the District Court and affirmed by the Circuit Court of Appeals, was wrong; and that it shall, on that ground, reverse that decision. Such a prayer is directly contrary to the established policy of this Court. It is not the duty of this Court to re-examine decisions of issues of fact reached by subordinate federal Courts.

It is particularly improper to seek such a review here, where—as is true in this case—a Circuit Court of Appeals has approved findings of fact made by a District Court.

In *Allen v. Trust Company of Georgia,* 326 U.S. 630, 636 (1946), the Court stated the established rule as follows:

> "* * * Here two courts have resolved that question of fact in favor of respondents. * * * Those findings, being concurrent findings of the two lower courts, will be accepted here without reexamination of the evidence."

See also

U. S. v. O'Donnell, 303 U. S. 501 (1938).

III. The District Court Committed No Error in Rejecting Plaintiffs' Offers of Expert Testimony as to the Meaning of "Executive Capacity."

In their petition for certiorari (pp. 26-27), the plaintiffs complain because the Trial Judge rejected their offers of the oral testimony of certain labor union representatives, who proposed to express their opinions, as experts having no personal knowledge of the facts of the case, that the plaintiffs had not been exployed as "executives."

These rulings upon evidence were correct, and can afford no occasion for a review of the case here. Under Section 13 of the Act (29 U.S.C. 213), and under the law expressed and implied in *Walling v. General Industries Company, supra,* the only legally applicable test of exempt "executive" status is that afforded by the Adminis-

trator's Regulation. If, in their opinions upon the plaintiffs' hypothetical questions, the plaintiffs' experts proposed to accept the tests laid down by the Regulation then (as is stated in the Opinion of the Circuit Court of Appeals, R. 425) the exclusion of their testimony did the plaintiffs no harm, for the facts of the plaintiffs' employment and status were fully developed in the record. If, on the other hand, the plaintiffs' experts proposed to apply some standard or some definition of "executive" status other than that prescribed by the Regulation, then their opinions were incompetent and irrelevant, because the Act, by giving the Administrator the power to define and delimit exempt executive status, necessarily deprives any other authority, however expert he may be, of any legal power or right to interpret the Act in this particular.

Plaintiffs' position on this point of the case is not helped by their reference to the pamphlet "Executive, Administrative, Professional * * * Redefined," issued by the Administrator on October 24, 1940. In that pamphlet, an official publication, the Administrator stated, *inter alia,* his reasons for adopting the six tests of exempt executive status, laid down by Regulation 541.1. In the course of this explanation he declared that he had considered the practice of labor unions, and the testimony of labor union officials, in his establishment of the line between exempt executive and non-exempt subordinate employees. But the pamphlet made no suggestion that any District Court should ever be called upon to reexamine the questions which the Administrator had decided prior to the issuance of the Regulation, least of all that it should be the obligation of any District Court to reconsider the expert testimony of any labor union

official or any other person concerning the characteristics of executive status in industry.

In short, although the expert testimony now under consideration would probably have been relevant to the Administrator's investigation, which led to the formulation of his six conjunctive tests of executive status, such testimony cannot be used now to modify his Regulation, or in any way to impair its effect in such a case as this. For this purpose, the Administrator's Regulations have the same effect as though they had been written into the Statute (see *Sun Publishing Co. v. Walling,* 140 Fed. (2d) 445, 449 (6 C.C.A., 1944); *Stanger v. Vocafilm Co.,* 151 Fed. (2d) 894; 162 A.L.R. 216 (2 C.C.A., 1945); and *Walling v. General Industries Company, supra*), and are as little open to interpretation or modification by expert witnesses.

Conclusion.

The petition for certiorari states no reason which could justify a review by this Court of the decision concurred in by the two Courts below. The petition should, therefore, be dismissed.

Respectfully submitted,

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